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No. 89-344

In the

Supreme Court of the United States

October Term, 1989

JAMES M. WOODWARD,

Petitioner,

V.

UNITED STATES,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Review of the government's brief confirms both the errors of the court below and the importance of this case.

The government relies on Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), but a petition for writ of certiorari now has been filed in that case.[1] The Ben-Shalom and Woodward petitions should be considered together.[2] They raise similar questions but on different facts,[3] thus sharpening the issues before the Court. The Ben-Shalom opinion, moreover, conflicts

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1/ No. 89-876.

2/ We are informed the government does not oppose our request that consideration of the petition be deferred until consideration of Ben-Shalom's.

3/ See, Petition at 11, n.4, 13, n.5, n.8

significantly with the Federal Circuit's on both the First Amendment and equal protection issues.

On the First Amendment issue, the Seventh Circuit found Ben-Shalom's acknowledged desire to commit homosexual acts--not her speech or association--caused her exclusion from the Army. Here the Federal Circuit made no similar finding. Indeed, the Navy never has disputed that Ensign Woodward's release was caused by his speech and nonsexual association, not just his sexual orientation.[4/] The Seventh Circuit

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4/ Woodward's sexual orientation had been a matter of official record since his enlistment. Navy policy at the time allowed retention of some homosexuals, including those who had committed homosexual acts. Ensign Woodward was not released until he was seen associating with a gay servicemember, and thereafter spoke or wrote to his superiors, at his own initiative. The Navy's advice to

(footnote continued)

expressly acknowledged Ben-Shalom's First Amendment rights to speak on Army policy and associate with homosexuals. 881 F.2d at 462. The Federal Circuit, however, held Ensign Woodward's communications constitutionally unprotected and never addressed his association claim. See, Petition at 15-17.

In this Court, the government does not defend the Federal Circuit's holding on the speech issue. Like the Federal Circuit, however, it ignores Woodward's right of association. The government asserts Ensign Woodward's "behavior[]," not his "abstract" expression, is at

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4/ (footnote continued) the Board for Correction of Naval Records expressly asserted, moreover, that Ensign Woodward's association with a gay servicemember was a "sufficient basis" for his release, since it appeared to be a "public flaunting of his beliefs." Petition at 17.

issue. Opposition at 9. Yet the government overlooks that this "behavioral component" consisted entirely of association protected by the First Amendment. The only evidence of behavior by Ensign Woodward was his non-sexual association with a gay service-member and his statement that he "associate[d] with other homosexuals." Petition at 4.

On the equal protection question, the Federal Circuit's opinion also conflicts with Ben-Shalom.[5/] The Seventh Circuit said exclusion from the

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5/ Contrary to the government's Opposition, at 10, n.10, we maintain in this Court, as we did below, that the Navy's release of Ensign Woodward employed criteria deserving suspicion, that heightened scrutiny of this action therefore is warranted, and that the Navy's action should be accorded no presumption of validity. Petition at 14.

military for mere homosexual tendency or interest would be impermissible. 881 F.2d at 460, 462. Here, the Federal Circuit has held that, absent a "claim" of celibacy, persons who merely acknowledge homosexual orientation and associate nonsexually belong in the same class as those guilty of criminal homosexual acts.6/ The Federal Circuit's reasoning involves two unacceptable leaps of logic--first, that acknowledgement of homosexual orientation constitutes admission of sexual conduct, and, second, that the sexual conduct must have been criminal. The Federal Circuit's thinking is no more acceptable

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6/ On this point, moreover, the government distorts the record, saying Woodward "has, since 1972, declined to assert that he has refrained from homosexual conduct." Opposition, at 10. Woodward has not "declined"; the Navy never asked.

than inferring illegal fornication, adultery, and prostitution from acknowledgement of heterosexual orientation.7/

The government, to its credit, does not defend this reasoning by the Federal Circuit. But it erroneously asserts "the Navy reasonably concluded" Ensign Woodward "was likely to commit homosexual acts." Opposition at 14. The government cites nothing to support this assertion. Nothing in the record does so. This post hoc rationalization by the Solicitor General cannot be accepted. Burlington Truck Lines v.

7/ Contrary to the government's Opposition, at 9, Woodward does not assert the Court of Appeals found him guilty of criminal acts. Rather, the Court of Appeals presumed Woodward's guilt of such acts, for purposes of his equal protection claim, by placing him in a class defined by criminal conduct. Pet. App. 36a-37a.

United States, 371 U.S. 156, 168-169 (1962). See also, Petition at 13, n.5.8/ The Navy, furthermore, deliberately chose not to assert this rationalization below. It declined to respond to the District Court's order for "an explanation of the application of the Navy's retention policy regarding homosexuals to [Ensign Woodward]." Petition at 6. Instead, the Navy claimed an "independent basis" for Woodward's release. The Court of Appeals rejected the fallacious "independent basis" theory, and the government now has abandoned it.9/

8/ This rationalization, moreover, is undercut by the Navy's admission, Opposition at 15, n.13, that its "pre-1981" policy--applicable to Woodward--allowed retention of some homosexuals who had committed sexual acts.

9/ This has another important consequence. Given the Navy's refusal below to state the pre-1981 retention

(footnote continued)

The government improperly presents other new arguments in this Court. Attempting to cure the Navy's failure below to articulate any interests adversely affected by Ensign Woodward's acknowledgement of homosexual orientation and nonsexual association, the government now quotes a 1982 Defense Directive.[10] The Directive advanced two reasons for excluding gays from military service: (1) their presence offends others who hold prejudices against gays and (2) gays pose security risks. Opposition at 11-12. Neither

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[9] (footnote continued) criteria, and their application to Ensign Woodward, the government's abandonment in this Court of the "independent basis" theory means that Woodward's nonconstitutional claim now stands firmly established. See, Petition at 6, 17-18.

[10] Department of Defense Directive No. 1332.14 (Jan. 28, 1982).

reason was argued below.

Even if the Navy may present these reasons now, however, without remand for initial consideration by the lower courts, this Court still should grant the petition. The government's first reason sanctions private prejudice. It is incompatible with Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985).11/

The government's second reason also is invalid. After the meeting at which Ensign Woodward acknowledged his sexual orientation, Navy officials allowed him

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11/ The government says Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), deemed servicemember prejudice a legitimate reason for exclusion of gays. Opposition at 12-13. Beller, however, concerned gays who had committed homosexual acts. Beller did not approve government sanction of private prejudice against persons merely because of their feelings, beliefs, expression, or association.

to retain his security clearance.[12] Further, since the filing of our petition, two members of Congress have released two reports commissioned by the Defense Department which were not previously available to the public.[13] After exhaustive study of military records, these reports concluded that gay men and women were suitable for military service and were not security

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12/ Plaintiff's Renewed Motion for Summary Judgment, filed in the Claims Court July 15, 1985, at App. 13.

13/ Defense Personnel Security Research and Education Center (Perserec), "Nonconforming Sexual Orientations and Military Suitability," Prepared by Theodore R. Sarbin, Ph.D. and Kenneth E. Karols, M.D., Ph.D., December 1988, (hereinafter, "Perserec 1988 Report"); "Preservice Adjustment of Homosexual and Heterosexual Military Accessions: Implications for Security Clearance Suitability," prepared by Michael A. McDaniel, (January 1989) (hereinafter, "Perserec 1989 Report").

risks.[14] The reports urged the

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[14] The 1988 Perserec Report found, at 25, that "the available data all point to the conclusion that preservice background characterization and subsequent job performance of homosexuals in the military is satisfactory (Williams and Weinberg, 1971; McDaniel, 1989; Zuliani, 1986; Crittenden Report, 1957)." Perserec also reviewed the 1957 Crittenden report--Report of the Board Appointed to Prepare and Submit Recommendations to the Secretary of the Navy for the Revision of Policies, Procedures and Directives Dealing with Homosexuals, (Gibson, 1978)--and concluded, at 29, that "In the 30 years since the Crittenden report was submitted, no new data have been presented that would refute its conclusion that homosexuals are not greater security risks than heterosexuals." The Report reviewed studies of gay veterans and concluded that "Studies of homosexual veterans make clear that having a same-gender or opposite-gender orientation is unrelated to job performance in the same way as being left--or right--handed (Williams & Weinberg, 1971)." Id. at 33. The Report therefore concluded that gays should be treated as the military would treat other racial or ethnic minority groups.

The Perserec 1989 Report studied the suitability of gay men and women for security clearance and concluded, at

(footnote continued)

military to change its policy of excluding gays. The Department sought to suppress the studies.15/

CONCLUSION

The petition should be granted, the decision below reversed, and the case remanded for further proceedings.

Respectfully submitted,

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14/ (footnote continued)
21, that "the preponderance of the evidence presented indicates that homosexuals show preservice suitability-related adjustment that is as good or better than the average heterosexual."

15/ Sciolino, Report Urging End of Homosexual Ban Rejected by Military, The New York Times, Oct. 22, 1989, at A1, col. 6.

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